FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 15-09

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

RESPONDENT

AND

NATIONAL TREASURY EMPLOYEES UNION

CHARGING PARTY

Case Nos. WA-CA-11-0515
WA-CA-11-0516

Kristine T. Burgos
For the General Counsel

Jennifer S. Grabel
For the Respondent

Kenneth Moffett
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Pursuant to contract provisions that allow either party to initiate limited mid-term bargaining, the NTEU asked the IRS to negotiate procedures to govern the way the Agency addresses emergencies. In connection with this request, the Union asked the Agency for redacted copies of numerous security-related documents, so that it could "prepare for negotiations." Before either side had submitted any specific proposals, the IRS refused to bargain, asserting that all of the matters raised by the Union excessively interfered with management's right to carry out the agency mission during emergencies, and that some of the matters were also covered by their collective bargaining agreement (CBA). The Agency also denied the Union's information request, asserting that the Union failed to explain why it needed the requested information and that producing those documents would be too

burdensome. But the IRS has failed to show that the matters the Union sought to negotiate are outside its duty to bargain; therefore it committed an unfair labor practice when it refused to bargain. However, because the Union provided only a short, superficial, and conclusory explanation as to why it needed the requested information, and because it would take thousands of employee-hours to produce that information, the Respondent did not commit an unfair labor practice when it denied the Union's information request.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101 *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On July 27, 2011, the National Treasury Employees Union (the Union or NTEU) filed an unfair labor practice charge against the Department of the Treasury, Internal Revenue Service (the Agency, Respondent or IRS), docketed as Case No. WA-CA-11-0515. GC Ex. 1(a). In that charge, the Union alleged that the Agency violated the Statute by refusing the Union's request to bargain over protocols that would govern the manner in which the IRS addresses emergencies. On July 28, 2011, the NTEU filed a second charge against the Agency, docketed as Case No. WA-CA-11-0516, alleging that it violated the Statute by refusing to provide the Union with information it had requested in connection with its request to bargain. GC Ex. 1(b). After investigating the charges, the Regional Director of the FLRA's Washington Region, on behalf of the General Counsel (GC), issued a Complaint and Notice of Hearing on April 17, 2012, consolidating the two charges and asserting that the Agency violated §§ 7114(b)(4) and 7116(a)(1), (5), and (8) of the Statute by engaging in the actions alleged in the charges. GC Ex. 1(c). The Respondent filed its Answer to the Complaint on May 11, 2012, denying that it had violated the Statute. GC Ex. 1(f). The Respondent also filed a Motion for Summary Judgment, which the General Counsel opposed and I denied. GC Exs. 1(g), (h), & (i).

A hearing was held in this matter on June 28, 2012, in Washington, D.C. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. GC Exs. 1(c) & 1(f). The Union is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a unit of the Respondent's employees. *Id.* The Union and the Respondent are parties to a CBA, which has been in effect at all relevant times. Jt. Ex. 1; Tr. 14, 55, 73.

The Union represents approximately 80,000 to 90,000 IRS employees in a nationwide unit covering hundreds of offices across the country. Tr. 14, 107. Local Union representatives had raised concerns to national Union officials about how the Agency had responded to natural disasters and other types of emergencies that had occurred in various offices. Tr. 16, 18, 75, 78. To address these concerns, the Union decided that it would ask the Agency to engage in nationwide mid-term bargaining. The Union initiated that process by sending a letter dated June 3, 2011, to the Agency's Director of Workforce Relations, invoking Article 47 of the CBA[1] and stating that the Union sought to "[e]stablish protocols

[1] The relevant portions of Article 47 state:

> Section 1. General Provisions
>
> A. This Article establishes ground rules for mid-term bargaining between the parties. . .
>
> . . . .
>
> M. In accordance with 5 U.S.C. Chapter 71, to the extent permitted by law, either national party may initiate mid-term bargaining by proposing changes in conditions of employment provided that such changes are not covered by this or any other collective bargaining agreement between the parties, and provided further that such changes do not relate to matters over which either party has expressly waived its right to bargain during the negotiation of this Agreement.
>
> . . . .
>
> Section 2. National Bargaining.
>
> A. Notice
>
> Where either party proposes changes in conditions of employment, not covered by Sections 3, 4, 5 and 6 below, it will consolidate those proposed changes and serve notice thereof monthly. Such notice will be due within three (3) workdays of the beginning [of] each month.
>
> . . . .
>
> C. Briefings
>
> Following receipt of notice consistent with subsection 2A and 2B above, the receiving party will be entitled to a briefing without notice to the other party.
> 1. The briefing must be held within thirty (30) days of receipt of the notice, unless the parties mutually agree otherwise, and will be scheduled by the party initiating the monthly notice.
>
> . . . .
>
> 4. Unless otherwise agreed, proposals must be submitted within fifteen (15) days of the briefing, if one is held. If no briefing is held, proposals must be submitted within thirty (30) days of the receipt of the notice.
>
> D. If the fifteenth (15th) day or the thirtieth (30th) day, referred to in subsection 2C above, falls on a Saturday, Sunday, or holiday, the period shall run until the end of the next workday which is not a Saturday, Sunday, or holiday.

that will govern the manner in which the agency addresses emergencies that affect bargaining unit employees (e.g., floods, fires, hurricanes, tornados, etc.)." Jt. Ex. 2 at 1; Tr. 58.[2] The Union referred to this request as the "Establishment of Emergency Protocols initiative" (the initiative). *See, e.g.*, Jt. Ex. 3. In the June 3 letter, the Union further explained:

> NTEU seeks to negotiate a process and various arrangements under which the IRS addresses emergencies impacting bargaining unit employees in a uniform and consistent manner. Issues to be addressed will include such subjects as: Flexiplace; administrative leave; access to the building; daycare; lack of water pressure in the facility; and entitlement to mileage reimbursement.

Jt. Ex. 2 at 2. The Union added that establishing such protocols would allow the Agency to "ensure that emergency situations are addressed in a uniform manner and bargain appropriate arrangements for bargaining unit employees impacted by Agency-declared emergencies." *Id.*

The Union characterized its request as a proposed change in conditions of employment. *Id.* at 1-2. At the hearing, Alexa Rukstele, the Union's lead negotiator on this initiative, further explained that as a technical matter, the Union's initiative did not contain any formal proposals. Tr. 67. Rather, Rukstele stated, the initiative simply started the bargaining process and gave the Agency an opportunity to obtain further information through a briefing, after which proposals would be submitted. Tr. 67-68. She explained that pursuant to Article 47, Section 2.C.4., the non-initiating party (in this case, the IRS) "would have been the first party to submit proposals with respect to this initiative." Tr. 68; *see also* Tr. 39, 56.[3]

In connection with the initiative, the Union sought to obtain copies of the Agency's plans for dealing with emergencies, referred to generally as business continuity plans. Tr. 20, 22, 44, 79-80. The Union was especially interested in obtaining: (1) occupant emergency plans, which set forth procedures for evacuating, or taking shelter in, a building (Tr. 28, 98,

---

[2] This was the second of two mid-term bargaining initiatives proposed in the June 3 letter. The first initiative related solely to a single IRS facility and is not the subject of the instant unfair labor practice case. The Union's letter cited Article 47, Section 6 of the CBA as covering the two initiatives, but Ms. Rukstele testified that the Establishment of Emergency Protocols initiative was a nationwide issue and was therefore intended to be negotiated under Section 2, not Section 6. Tr. 56-58. The Agency did not dispute the applicability of Section 2 to the Establishment of Emergency Protocols initiative.

[3] The language of Section 2.C.4. (cited in note 1 above) does not specify whether both parties are required to submit proposals simultaneously fifteen days after the briefing, or whether the initiating party submits proposals after the non-initiating party has done so (as described by Ms. Rukstele). The Agency did not take issue at the hearing with Ms. Rukstele's testimony on this point, and there is no evidence as to whether the parties had established a practice that would clarify the contractual language. Ms. Rukstele also cited Section 2.D. in regard to the procedure for submitting bargaining proposals (Tr. 67), but Section 2.D. only addresses the calculation of due dates, not the sequence for submitting proposals. Jt. Ex. 1 at 130; *see* note 1 above.

109); (2) incident management plans, which are standardized, strategic plans for dealing with emergencies that are broader in scope than the emergencies covered by occupant emergency plans (Tr. 28, 106-10); (3) continuity plans (formerly called business resumption plans), which are used to recover disrupted business processes (Tr. 28-29, 119); and (4) disaster recovery plans, which are used to recover disrupted information technology systems – the "infrastructure network, hardware systems, applications and operating systems." Tr. 28-29, 152-54.

On June 16, 2011, Rukstele emailed the Agency, asking for the documents listed below. Specifically, Rukstele requested:

> 1. A copy of all Business Continuity Plans (BCPs), including, but not limited to Incident Management Plans, Occupant Emergency Plans, Business Resumption & Disaster Recovery Plans and Decision Matrices, for each business unit, division, POD [Post of Duty] and/or geographic region in which the plan applies, redacted, as needed, for internal security purposes;
>
> 2. The effective date of any such BCP;
>
> 3. The dates and locations (including POD) in which any such BCP has been implemented since it became effective and the reasons therefore; and
>
> 4. The underlying authority concerning the creation of any such BCP, including any plan or document contained therein.

Jt. Ex. 3. Rukstele's letter stated that the Union was requesting the information "in order to prepare for negotiations[,]" and she asserted that "[s]uch documents are necessary for NTEU to properly prepare for negotiations with respect to the Establishment of Emergency Protocols initiative." *Id.* The letter did not elaborate as to why the Union needed the information. At the hearing, Rukstele was asked whether she had modeled this request on a similarly worded request submitted in 2010 by another NTEU negotiator, which had been denied. Tr. 21, 47-48; *see* Respondent's Motion for Summary Judgment (MSJ), Tab 12 of GC Ex. 1(g) (email dated August 12, 2010, from Anna Gnadt to David Krieg).[4] Rukstele stated, "I do not believe I've seen the prior information request." Tr. 42.

The Agency requested that the Union provide a briefing on the initiative, and on July 6, 2011, Rukstele and four chapter presidents briefed Christina Ballance (an official in the Agency's Labor Relations Strategy and Negotiations office) and other IRS representatives via a conference call. Tr. 37, 83, 184-85. During the briefing, the Union's representatives talked in more detail about what they hoped to accomplish through negotiations. Rukstele

[4] Similar to Rukstele's request, the 2010 information request asked for all business resumption plans across the Agency, the effective date of such plans, the "dates and locations . . . in which any such [plan] . . . has been implemented since it became effective, the reasons therefore, and any notice given to NTEU[,]" a copy of any notices to NTEU concerning the creation or negotiation of such plans, and the "underlying authority for the creation of any such" plan. Tab 12 of GC Ex. 1(g).

stated that the Union sought to create a "uniform protocol or procedures" for administering matters like flexiplace and administrative leave and for notifying employees about emergencies and when those emergencies are over. Tr. 62-63. Malcolm Gettmann, a chapter president based in San Diego, stated that the Union wanted to bargain about matters such as testing air quality to determine whether a building was safe for reentry after (for instance) a chemical spill. Tr. 83.

The Agency's representatives asked only a few questions about the Union's initiative. Ballance asked the Union about the scope of the initiative and why the Union wanted to bargain over daycare and other subjects referenced in the initiative. Tr. 63, 89-90, 187. But she and the other management representatives spent most of the briefing listening to what the Union officials had to say. Tr. 39.

Neither side engaged in a substantive discussion at the briefing about the Union's information request. As Rukstele put it at the hearing, "The information – it was not really discussed. . . . There was no specific discussion of the information." Tr. 38; *see also* Tr. 64-65. Rukstele added that "the Agency did not specifically inquire or make inquiries with respect to the Union's particularized need or make any allusions to concerns about security or privacy or any of those other types of things up there." Tr. 65; *see also* Tr. 38.

Ballance similarly recalled that there was only a "cursory" discussion of the Union's information request at the briefing; she did not recall asking about the Union's need for the requested information, and she did not ask the Union to clarify its request. Tr. 185, 189-90. In addition, Ballance acknowledged that she did not raise any anti-disclosure concerns, including concerns about security. Tr. 190; *see* Tr. 39, 64-65.

The briefing lasted about half an hour. The participants left the briefing with markedly different impressions about where things stood. Rukstele and Gettmann came away believing that the Agency had no objection to bargaining or to the information request. Tr. 38-39, 83, 89. Ballance, by contrast, came away from the briefing convinced that matters raised in the Union's initiative were nonnegotiable under § 7106 of the Statute or were covered by the CBA. Tr. 188.

The IRS Declines to Bargain

In a letter to the Union dated July 21, 2011, the Agency declined to bargain over the Union's initiative, which it characterized as a "proposed change." Jt. Ex. 5 at 1. The Agency asserted that two issues (flexiplace and administrative leave during emergencies) were covered by the CBA (Article 50, Section 6.E. and Article 36, Section 3.E., respectively) (Jt. Ex. 1 at 137 & 101) and thus not subject to mid-term negotiations.[5] It further asserted:

[5] In its MSJ, the Respondent cited additional CBA provisions that covered the Union's initiative. First, it alleged that the "issue of Administrative Leave during an emergency is specifically covered by" all of Article 36, Section 3. GC Ex. 1(g), R. MSJ at 10 n.4. Second, it argued that Article 27, Section 1.E. of the CBA covers "notifying the Union regarding evacuation due to bomb threats." *Id.*

> With regard to the other issues discussed during the briefing, the IRS has no obligation to bargain protocols that will govern the manner in which the agency addresses emergencies that affect bargaining unit employees, because management has the right under 5 U.S.C. § 7106(a)(2)(D) to take whatever actions may be necessary to carry-out the Agency mission during emergencies.

Jt. Ex. 5 at 1.

Witnesses for both parties elaborated on these matters at the hearing. With regard to management rights, Ballance asserted that the Union was discussing issues "such as calling employees back to work after an emergency occurs, things of that nature," and that "the employer has a right under 7106 to recall employees." Tr. 205, 207. Ballance added that "whether a building's open or not is a management decision to make." Tr. 207. By contrast, Rukstele asserted that the Union sought only to bargain over negotiable matters, specifically the procedures to be used by the Agency in exercising its rights and arrangements for employees adversely affected by the Agency's emergency decisions. Tr. 16.

With regard to whether flexiplace is covered by the CBA, Ballance testified that Article 50 "generally discusses the ability of employees to request and be approved for flexiplace" and that Section 6.E. of the article "deals with when an emergency condition forces the closure of an IRS facility." Tr. 193-94. Ballance acknowledged that not all employees are allowed to work on flexiplace, and that Article 50, Section 6.E. might not apply to some types of emergencies. Tr. 195. Specifically, when Ballance was asked whether Section 6.E. would guide the Agency's actions in an event like the September 11th terrorist attacks, she stated:

> I do not think Section 6E speaks to that specific issue. However, I think practically Article 50 speaks to it. One of the issues constantly discussed is, you know, if the employee doesn't – has the equipment as part of their jobs to be able to work flexiplace. You know, there's some practicalities with regard to it if you're – aren't already on flexiplace getting what you need to work flexiplace once an emergency has already occurred. I think there's some problems – there might be some problems with regard to that. But I think Article 50 covers the issue.

Tr. 196. In addition, Ballance acknowledged that she was "not at the bargaining table" and could not speak to the drafters' intent. Tr. 194.

Rukstele, who also could not speak to the bargaining history or the CBA drafters' intent, countered that the "only thing that's addressed" in Article 50 regarding flexiplace is an employee who is "currently on flexiplace, working flexiplace when a building is closed and

---

Third, the Respondent argued that Article 27, Section 4.D.4. of the CBA covers the "means for advising employees of emergency evacuation procedures." *Id.*

his or her responsibility to continue working at that time." Tr. 18, 70-71. But, Rukstele asserted, "if a building is closed or if an employee is unable to get to the building, whether he or she is . . . entitled to work flexiplace, expected to work flexiplace, the procedures for that, none of that is addressed." Tr. 18. Similarly, Rukstele asserted that the "only time that emergencies are even mentioned is in Section 6E and it's if an emergency closes an IRS building and how would that affect employees that are already working at a flexiplace location, not about an entire – employees' ability to work flexiplace in response to any type of an emergency." Tr. 17.

With regard to whether administrative leave is covered by the CBA, Ballance contended that "Administrative leave is covered by the contract," specifically Article 36, Section 3.E. Tr. 197. Rukstele countered that Article 36 "only addresses natural disasters, not other types of disasters that may not be natural, such as power outages, lack of water pressure, lack of potable water, some sort of terrorist attack." Tr. 18. Rukstele added that "the time an employee would need to go back to the office to retrieve materials to be able to work at home if the air is not – if there are air quality problems in the building" is also not addressed in Article 36. Tr. 18.

Finally, Ballance effectively conceded that many issues in the Union's initiative are not covered by the CBA. Asked whether there was an article in the CBA relating to daycare, Ballance answered, "No not – no, I don't believe so." Tr. 208. Asked whether there was a provision addressing building access during emergencies, Ballance answered, "Not that I'm aware of." Tr. 196. And Ballance confirmed that she did not believe daycare, lack of water pressure, or mileage reimbursement is covered by the CBA. Tr. 197.

The IRS Denies the Union's Information Request

In another letter dated July 21, 2011, the Agency refused to furnish the Union with the information it had requested on June 16, because the Union "failed to provide a particularized need for the data."[6] Jt. Ex. 4 at 2; Tr. 198-99, 201. In addition, the Respondent claimed that the requested documents were not reasonably available because the costs would be "excessive," and because producing the documents would "displace[] . . . the IRS's workforce" and "require extreme or excessive means." Jt. Ex. 4 at 2.

Witnesses for both sides elaborated at the hearing on their positions relating to the information request. With regard to particularized need, Rukstele testified that the Union needed the requested documents "to intelligently negotiate processes, procedures, and appropriate arrangement stemming from what the Agency was planning to do – what the established plans were." Tr. 21. She explained that "in order to negotiate I&I, impact and implementation, proposals for the Agency's current plans it's necessary to see the plans and know what the Agency's plans are to respond to emergencies." Tr. 22. She further stated that the Union would use the information "to review these plans and determine what types of proposals would be appropriate after reviewing the information contained in the plans and

[6] The Respondent did provide one short document pertaining to office closures and administrative leave. *See* Jt. Ex. 4.

how to, you know, best convey the information to employees and ensure that the plans were properly implemented and were implemented – and that all the procedures were there for employees." Tr. 22-23. Similarly, Gettmann testified that the Union needed the documents to "gather information about how current the plans were," to see whether there was a "common structure that already existed," and to draft "timely, accurate, and decisive proposals." Tr. 79. Gettmann acknowledged, though, that he did not express those views to the Respondent. Tr. 79, 84-85.

On the Agency's side, Ballance testified that the Union did not explain at the briefing why the Union needed the full extent of the information it had requested. Tr. 185-86. Ballance said that the Agency understood the Union's information request to apply to both current and past plans, because the request asked for the "[d]ates and locations in which such BCPs [have] been implemented." Tr. 212-13. Moreover, the request asked for "effective dates" and didn't specify the Union wanted only "a current copy" of the BCPs. Tr. 213. Ballance admitted that the Respondent did not ask the Union whether it needed past business continuity plans or whether the Union could narrow the scope of the request. Tr. 213-14.

The Respondent called two witnesses to discuss the availability of the requested documents. First was Sue Wolters, a security specialist with the IRS Office of Continuity Operations, which advises the Agency on polices concerning security-related documents. Tr. 95-96. With regard to occupant emergency plans – procedures for evacuating, or taking shelter in, a building – Wolters testified that there are approximately 649 current plans, all of which are stored electronically. Tr. 99, 100, 103. Although occupant emergency plans are intended to be distributed to employees (*see* Tr. 80-81, 85-86), Wolters testified that the Agency does not allow them to be seen externally because "it's a risk or a security threat for people to know what our procedures are." Tr. 99. Wolters stated that it took her two hours to redact a sixty-six-page occupant emergency plan. R. Ex. 1; Tr. 104-05. During those two hours, Wolters redacted personally identifiable information, "internal numbers" and other unpublished information, and anything that was a "specific procedure . . . that said what we do, who does it and how we do it." Tr. 104-05. Wolters noted that the Agency has prepared occupant emergency plans annually for twenty-five years, and that it would be especially difficult to obtain the archived plans because they are not centrally located. Tr. 100-01.

With regard to incident management plans – standardized, strategic plans for dealing with emergencies – Wolters stated that there are twenty-three such plans covering different geographical regions, and that all are based on a single template. Tr. 28, 106-11, 115-16, 118-19, 145. For the hearing, Wolters redacted a sixty-six-page incident management plan using the same criteria for redaction as for the occupant emergency plan; she stated that redaction was necessary for "safety and security." R. Ex. 2; Tr. 112-13; *see* Tr. 133. It took Wolters about one hour to redact the document. Tr. 113. She added that the Agency has produced incident management plans annually since 2000. Tr. 108.

With respect to continuity plans – plans for recovering disrupted business processes, such as the processing of a tax return – Wolters testified that there are approximately 3324 current continuity plans, all of which are stored electronically. Tr. 28-29, 119, 102-03, 122, 124. She explained that these plans must be redacted before being released, as they are highly sensitive and distributed only on a "need to know" basis. Tr. 121, 128. It took her four hours to redact a 197-page continuity plan. R. Ex. 3; Tr. 130. As with the other documents, Wolters stated that she redacted personally identifiable information, as well as "[a]nything that was a number or something that wasn't published outside the Agency," and "anything that was specific procedures . . . of who did what." Tr. 128. Finally, she acknowledged that the Agency did not consult her prior to denying the Union's information request. Tr. 141.

Robert Finstad, a senior manager at the IRS specializing in cyber security, testified for the Respondent on the availability of disaster recovery plans, which are used to recover disrupted information technology systems. Tr. 28-29, 151-54. He stated that disaster recovery plans are highly sensitive documents that are distributed on a "need to know" basis. Tr. 154. Disaster recovery plans are not distributed widely, Finstad explained, because they "control the keys to the kingdom." Tr. 154. He explained:

> [O]ur role in cyber security is to secure the IRS and we have to control all points of possible attack. So a plan like [disaster recovery] has the entire instructions on how to build the system, all the information about how important the system is, where we'd recover the system, and if someone who didn't have access to it could cause some damage.

Tr. 154. Finstad estimated that there are 750 current disaster recovery plans, and that each plan has, on average, about 125 pages, excluding pages filled with hyperlinks. Tr. 154-55. It took Finstad six and a half hours to redact a 170-page disaster recovery plan, crossing out personally identifiable information and "anything that I thought could leave the IRS at risk to attack," including references to software, equipment, and recovery steps. R. Ex. 4; Tr. 158-59. He stated that he would only allow employees Grade 15 and above to redact disaster recovery plans, because there are "decisions that have to be made and you have to understand the infrastructure of the IRS and the way we're set up to really fully comprehend what you're doing." Tr. 160. Asked how long it would take to redact all current and prior disaster recovery plans, Finstad replied that it would take about a year and a half,[7] or around $300,000

[7] Unfortunately, Finstad was not asked to explain how he arrived at this figure. Since he testified that it took him 6 1/2 hours to redact one of the 750 current disaster recovery plans, it would seem that it would take 4875 hours to redact all of them, for a single year. Based on an employee working 2080 hours a year, 4875 hours would represent about 2 1/3 years of work. Since Finstad was asked how long it would take to redact both the current and the prior years' disaster recovery plans, his response of 1 ½ years appears to be a gross underestimate, unless he assumed there would be economies of scale that would reduce the time to redact multiple plans, or unless he based his estimate on just the current year's plans. But he doesn't refer to any such assumptions, so I cannot make any. Despite these ambiguities, I credit Finstad's estimate that it would take a GS-15 employee 1 ½ years to redact the plans for current and prior years (i.e. 2007 to 2011), since it was clearly based on a significant effort and expertise on his part, and if anything, he underestimated the time necessary (which would benefit

in employee pay. Tr. 160. He added that the Agency has produced disaster recovery plans annually since 2007. Tr. 155. Finally, Finstad acknowledged that he had not been consulted about the Union's information request until a couple of months before the hearing. Tr. 162.

On the GC's side, Rukstele discussed two reports from the Treasury Inspector General for Tax Administration (TIGTA) that she found on the Internet shortly after the Agency denied the Union's information request. GC Exs. 2 & 3; Tr. 23, 25, 34. She testified that one report reviewed sixty-five continuity plans, and the other report reviewed thirty-nine incident management plans and sixty-five continuity plans. Tr. 30, 34. In addition, Gettmann testified that employees can easily obtain occupant emergency plans via email or the Agency's intranet. Tr. 81, 86.

Though the Agency did not immediately raise security-related anti-disclosure concerns, it attempted to raise them at the hearing through Richard Rodriguez, the IRS's National Director for Continuity Operations. Tr. 39, 167, 180-81, 190. Rodriguez testified that the requested documents – occupant emergency plans, incident management plans, continuity plans, and disaster recovery plans – taken together, would pose a security risk, stating that they would allow a person to "do some significant targeting of IRS employees and IRS emergency systems." Tr. 173. When asked how an occupant emergency plan that informed employees how to evacuate a building could be a security threat, Rodriguez stated that a person from outside the Agency could use the plan to do "advanced planning – you could cause a lot of havoc and damage if you know the entire plan and can . . . place a device" where IRS employees will be during the evacuation.[8] Tr. 179.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

General Counsel

In Case No. WA-CA-11-0515, the General Counsel argues that the Respondent violated § 7116(a)(1) and (5) of the Statute when it refused to bargain with the Union over its initiative. GC Br. at 8. While the GC asserts generally that the Union's initiative "did not seek to infringe on Respondent's right to make decisions in emergencies," the GC also acknowledges that management has the right under § 7106(a)(2)(D) of the Statute to carry out the agency mission during emergencies, and further argues that § 7106(a)(2)(D) matters are

---

the GC rather than his own employer). Moreover, the GC did not challenge his estimate in any way.

[8] The substance of Rodriguez's testimony pertains to security-based anti-disclosure concerns raised for the first time at the hearing. *See* Tr. 39, 64-65, 181, 190. The Agency was obligated to raise those concerns at or near the time it received the Union's information request, rather than at the hearing. *See Soc.Sec.Admin.*, 64 FLRA 293, 296 (2009) (*SSA 1*). Accordingly, I do not rely on the substance of Rodriguez's testimony.

nevertheless "subject to subsection (b)." *Id.* at 10-11, 14. Accordingly, it is the GC's position that the Respondent "had a duty to bargain over procedures and appropriate arrangements" pertaining to the Union's initiative. *Id.* at 8. Similarly, the GC asserts that the "bottom line is that the Union wanted to negotiate over procedures and appropriate arrangements" within the meaning of § 7106(b)(2) and (b)(3) of the Statute. *Id.* at 14. One of the procedures or arrangements cited in the Union's initiative is day care for children of employees, which the Authority has long found to be negotiable. *Id.*, citing *Nat'l Treasury Employees Union*, 30 FLRA 677, 682 (1987); *Am. Fed. of Gov't Employees, AFL-CIO, Local 32*, 6 FLRA 423, 423-27 (1981) (*Local 32*); *Am. Fed. of Gov't Employees, AFL-CIO*, 2 FLRA 604, 605-08 (1980), *enforced sub nom. Dep't of Def. v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981).

The General Counsel also rejects the Agency's claim that some aspects of the Union's initiative are covered by the CBA. While the GC states that it is "not disputing that the CBA contains . . . articles that deal with administrative leave and flexiplace, both of which could potentially apply in the event of an emergency[,]" it maintains that the articles on administrative leave and flexiplace "address matters different from the matters the Union wanted to negotiate." GC Br. at 12-13. For example, while Article 36, Section 3 "grants administrative leave in case the office is closed[,] it does not address issues related to building access, child care, air quality, etc. in the event of an emergency." *Id.* at 13.

In Case No. WA-CA-11-0516, the GC argues that the Agency violated § 7114(b)(4) and, thus, § 7116(a)(1), (5), and (8) of the Statute, by refusing to provide the Union with the information it had requested. *Id.* at 14-15. The GC asserts that the Union established a particularized need for the information because Rukstele's email "explained that it needed the information to prepare to bargain procedures and appropriate arrangements for employees affected by Respondent's plans for emergencies." *Id.* at 16, citing *U.S. Dep't of the Treasury, IRS*, 64 FLRA 972, 978 (2010) (*Treasury*). Further, the GC argues that Rukstele explained at the hearing that the Union needed the information "to intelligently negotiate processes, procedures, and appropriate arrangements stemming from . . . what the established plans were." GC Br. at 16.

The GC also asserts that because the Agency failed to raise security-related and other anti-disclosure interests when the Union submitted its information request, it cannot raise those concerns now. *Id.* at 19-20, citing *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Forrest City, Ark.*, 57 FLRA 808, 812 (2002); *Fed. Aviation Admin.*, 55 FLRA 254, 260 (1999). The GC adds that if a union establishes a particularized need for requested information and the agency fails to raise an anti-disclosure interest, then the agency commits an unfair labor practice. GC Br. at 20-21, citing *SSA 1*, 64 FLRA at 293; *Library of Cong.*, 63 FLRA 515 (2009).

With regard to whether the documents were reasonably available, the GC contends that there were only 4746 documents at issue here – 649 occupant emergency plans, 23 incident management plans, 3324 continuity plans, and 750 disaster recovery plans – and that the Authority has found that information contained in approximately 10,000 documents was reasonably available. GC Br. at 17-19 & nn.24 & 27; *see Dep't of Justice,*

U.S. Immigration & Naturalization Serv., U.S. Border Patrol, El Paso, Tx., 40 FLRA 792, 804-05 (1991) (*Border Patrol*). The GC also relies on decisions in which the Authority has found information reasonably available when retrieval would take three weeks *(Dep't of Health & Human Servs., Soc. Sec. Admin.*, 36 FLRA 943, 952, 960 (1990)) (*HHS*); cost $1500 (*U.S. Dep't of the Air Force, Air Force Logistics Command, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 37 FLRA 987, 993-94 (1990)) (*McClellan AFB*); or require a new computer program (*Dep't of the Navy, Naval Submarine Base, New London (New London, Conn.)*, 27 FLRA 785, 796-97 (1987)) (*New London*). GC Br. at 17-18 & nn.23 & 25-26. The GC also asserts that the Respondent did not: (1) "explain to the Union . . . why redaction would have been unduly burdensome[ ]"; (2) establish that it "could not, . . . over a period of time, provide the Union the information in redacted form[ ]"; or (3) "ask the Union to clarify its request[.]" GC Br. at 19. Finally, the GC notes that the Respondent did not consult Wolters, Finstad, and Rodriguez until after it had denied the Union's information request. *Id.* at 18.

As a remedy, the GC seeks an order directing the Respondent to bargain over the Union's initiative and provide the requested information. The GC also requests a nationwide posting signed by the IRS Commissioner.

Respondent

In Case No. WA-CA-11-0515, the Respondent contends that it had no obligation to negotiate regarding the Union's initiative. In this regard, it argues that the initiative would "excessively interfere" with its § 7106(a)(2)(D) right to carry out the agency mission during emergencies. R. Br. at 21. The Authority has held that proposals "preclud[ing] the Agency from independently assessing whether an emergency exists" are nonnegotiable,[9] and the Respondent argues that the Union sought to "define what constitutes an emergency, [by] pinpointing the anticipated circumstances as 'floods, fires, hurricanes, tornados, etc.'" *Id.* at 21-22. The Agency also asserts that proposals which "interfere with or prevent agency action in an emergency" violate § 7106(a)(2)(D), and "[t]he initiative – by definition – would operate to hinder the Agency from taking necessary actions in an emergency." R. Br. at 21, citing *Laborers' Int'l Union of N. Am., AFL-CIO-CLC, Local 1267*, 14 FLRA 686 (1984) (*LIUNA*). Further, while the Respondent acknowledges that the Union could bargain over "procedures and appropriate arrangements to be utilized in the event the Agency takes action in an emergency[,]" it argues that the Union "did not elaborate at the briefing regarding proposals for procedures or appropriate arrangements they wanted the Agency to contemplate." R. Br. at 22.

The Agency further contends that it has no obligation to bargain over "many of the specifics" listed in the Union's initiative because they are covered by the CBA. *Id.* at 22-23. Specifically, the Respondent argues that: (1) "Flexiplace in the context of emergencies is covered by" Article 50, Section 6.E.; (2) "Administrative Leave during an emergency is specifically covered by" Article 36, Section 3; (3) Article 27, Section 1.E. covers "notifying the Union regarding evacuation due to bomb threats"; and (4) Article 27, Section 4.D.4.

[9] *Nat'l Fed'n of Fed. Employees, Local 2059*, 22 FLRA 136, 141 (1986) (*Local 2059*).

covers the "means for advising employees of emergency evacuation procedures." *Id.* at 23. In addition, the Respondent maintains that the GC has the burden to establish, by a preponderance of the evidence, that the Agency violated the Statute when it declined to bargain over the Union's initiative. *Id.*, citing 5 C.F.R. § 2423.32.

Finally, the Respondent challenges the credibility of the testimony of Rukstele and Gettmann as to what was discussed at the July 6, 2011 briefing; because their testimony is unreliable, their explanation of the Union's bargaining initiative cannot be accepted. *Id.* at 24. The Respondent first attacks Rukstele's insistence that she had not modeled her 2011 information request on the Union's 2010 information request, even though the two are very similar. In the Agency's view, Rukstele's insistence was inherently improbable, based on the similarity of the two documents. *Id.* at 25. Further, Rukstele said she knew the Agency had denied the 2010 information request; thus she was not being truthful when she said she had "no indication" that the Respondent would deny the current information request. *Id.* Similarly, Gettmann could not have been only "tangentially" aware of the Respondent's denial of the 2010 information request, because he was "heavily involved" in the Union's initiative, had spoken with other chapter presidents about the way the IRS handles emergencies, had been a chapter president since 1999, and works on 100% official time. *Id.* at 26. Lastly, Gettmann's testimony that during the briefing management appeared "more than willing" to provide the requested information is inconsistent with all other testimony and evidence. *Id.* at 26-27 (quoting Tr. 83).

With respect to Case No. WA-CA-11-0516, the Respondent contends that the Union failed to establish a particularized need for the requested information, because it said only that it "needs the information to properly prepare for negotiations." R. Br. at 7-8. The Agency also asserts that the Union did not justify the scope of its request: the request had "no temporal limits . . . nor any explanation as to why the Union required local documents from far-flung posts of duty, nor any reason for requesting such details as each document's effective dates." *Id.* at 12. Further, the Respondent alleges that the Union had to establish particularized need at the time it submitted its information request and could not use the hearing to do so. *See Treasury*, 64 FLRA at 980. In addition, while the Respondent "concedes it did not raise security as a countervailing anti-disclosure concern[,]" it argues that "the consequences of releasing emergency plans are potentially disastrous to the Agency's operations and potentially fatal to Agency employees." *Id.* at 11.

According to the Respondent, the Authority stated in *Fed. Bureau of Prisons, Wash., D.C.*, 55 FLRA 1250, 1255 n.9 (2000) (*BOP*), that the reasonable availability of information is determined in significant part by the cost and displacement of an agency's workforce required to produce the information. R. Br. at 20. In *Dep't of Justice v. FLRA*, 991 F.2d 285, 291 (5th Cir. 1993) (*DOJ v. FLRA*) the Circuit Court held that information is not reasonably available if it would take several employees several weeks to retrieve and redact.[10] In this regard, the Agency claims that producing the documents requested by the

[10] In that case, the court reversed a decision by the Authority that the requested information was reasonably available. *Dep't of Justice, U.S. Immigration & Naturalization Serv., U.S. Border Patrol, El Paso, Tex.*, 43 FLRA 697 (1991) (*Border Patrol 2*).

Union would be far more burdensome, taking: (1) 1298 hours to produce all current occupant emergency plans (2 hours a document × 649 documents), and about 40 times that for producing all occupant emergency plans in existence; (2) 13,296 hours to produce all current continuity plans (4 hours a document × 3324 documents), and "a whole lifetime" to produce all such plans; and (3) 1.5 years to produce the requested disaster recovery plans.[11] R. Br. at 16-19.

Accordingly, the Respondent requests that the complaints in both cases be dismissed. *Id.* at 28.

Analysis

A. Case No. WA-CA-11-0515

It is an unfair labor practice "to refuse to consult or negotiate in good faith with a labor organization as required by" the Statute. 5 U.S.C. § 7116(a)(5). In *U.S. Dep't of the Interior, Wash., D.C.*, 56 FLRA 45, 50 (2000) (*Interior*), *on remand from U.S. Dep't of the Interior v. FLRA*, 174 F.3d 393 (4th Cir. 1997), the Authority held, among other things, that an agency is obligated to bargain during the term of a CBA on negotiable union proposals concerning matters that are not covered by or contained in the term agreement, unless the union has waived its right to bargain over that matter. *See also Nat'l Treasury Employees Union*, 64 FLRA 156, 157 (2009). The Respondent does not contend here that the Union waived its right to bargain.[12]

An agency is obligated to negotiate over matters that are within the duty to bargain, even though the union has not submitted specific proposals, unless the parties' collective bargaining agreement states otherwise. *See U.S. Dep't of Def., Def. Commissary Agency, Peterson AFB, Colo. Springs, Colo.*, 61 FLRA 688, 694 & n.5 (2006) (*DOD*). In this regard, the Authority has held that "an agency violates the Statute when it expressly refuses to negotiate over a matter within the duty to bargain, even if the refusal occurs before an exclusive representative has submitted bargaining proposals, given that the refusal renders the submission futile." *Am. Fed. of Gov't Employees, Local 1401*, 67 FLRA 34, 36 (2012).

The GC has the burden of proving the allegations in a complaint by a preponderance of the evidence, and the Respondent has the burden of proving any affirmative defenses. 5 C.F.R. § 2423.32. When an agency contends that a union's proposals are nonnegotiable, the Authority has stated that the agency has the burden of demonstrating that all proposals on

---

[11] The Respondent did not offer any evidence as to how much time it would take to produce incident management plans (current or archived), perhaps because producing those plans would not be particularly burdensome. In this regard, the Respondent acknowledged that Wolters needed only an hour to redact an incident management plan, and that the twenty-three incident management plans are similar to each other. R. Br. at 18-19.

[12] Similarly, it is undisputed that the Union had a right to engage in mid-term bargaining and that the Union's initiative pertains to conditions of employment. GC Br. at 9-10; R. Br. at 20-24, 27-28.

the table are nonnegotiable: "if *any* pending union proposals are negotiable, then the agency will be found to have violated the Statute . . . ." *Pension Benefit Guar. Corp.*, 59 FLRA 48, 50 (2003) (*PBGC*). Additionally, it is well settled that in unfair labor practice litigation, "covered by" is an affirmative defense. *U.S. Dep't of the Treasury, IRS*, 63 FLRA 616, 618 n.2 (2009) (*IRS*). Applying these principles to this case, the Respondent has the burden of showing that all aspects of the Union's initiative are outside the duty to bargain. If *any* aspect of the Union's initiative, or any proposal that could reasonably arise from that initiative, is within the duty to bargain, then the Respondent's refusal to bargain violated the Statute. *See also U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 65 FLRA 870, 874 (2011) (*Customs*).

The Respondent argues that on its face, the Union's June 3 initiative was ambiguous. R. Br. at 21. There is some truth to this claim, but this is due to the timing of the Agency's refusal to bargain. By declaring the Union's initiative nonnegotiable immediately after the Union had put it on the table and before the Agency had the opportunity to examine specific contract proposals from the Union, we cannot explore beneath the face of the initiative or evaluate the negotiability of such proposals. As a result, the Agency has made its own job (of showing that all aspects of the Union's initiative are nonnegotiable) more difficult. The Union's initiative must be construed in the broadest manner possible: as long as any proposal that can reasonably be inferred from the Union's initiative, as it was outlined to the Agency in Jt. Ex. 2 and at the July 6 briefing, is negotiable, the Respondent must be found to have violated the Statute.

1. The Respondent has failed to demonstrate that the matters raised in the Union's initiative are nonnegotiable under § 7106 of the Statute

Management's right, under § 7106(a)(2)(D),[13] to take whatever actions may be

[13] Section 7106 of the Statute provides, in pertinent part:

> (a) Subject to subsection (b) of this section, nothing in [the Statute] shall affect the authority of any management official of any agency –
>
> . . . .
>
> (2) in accordance with applicable laws –
>
> . . . .
>
> (D) to take whatever actions may be necessary to carry out the agency mission during emergencies.
>
> . . . .
>
> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating –
>
> . . . .
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

necessary to carry out the agency's mission during emergencies includes the right to: (1) independently assess whether an emergency exists; and (2) decide what actions are needed to address the emergency. *U.S. Dep't of Veterans Affairs, VA Reg'l Office, St. Petersburg, Fla.*, 58 FLRA 549, 551 (2003). Proposals that define "emergency" affect management's right under § 7106(a)(2)(D). *Int'l Bhd. of Elec. Workers, Local 350*, 55 FLRA 243, 245 (1999). However, not every proposal relating to agency actions taken to carry out the agency mission during emergencies is necessarily nonnegotiable under § 7106(a)(2)(D). As the Authority explained in *Nat'l Treasury Employees Union, Chapter 22*, 29 FLRA 348, 349 (1987), "only proposals which either directly interfere with agency action or prevent the agency from taking the emergency action are inconsistent with section 7106(a)(2)(D) and, therefore, nonnegotiable." Proposals that affect the exercise of management's right under § 7106(a)(2)(D) of the Statute may nevertheless be negotiable, either because they are procedures within the meaning of § 7106(b)(2) of the Statute, or because they are appropriate arrangements within the meaning of § 7106(b)(3) of the Statute.

With regard to both procedures and appropriate arrangements, the Respondent asserts that the Union "did not elaborate at the briefing regarding proposals for procedures or appropriate arrangements they wanted the Agency to contemplate." R. Br. at 22. But since proposals were not due until after the briefing,[14] there is nothing improper about the Union failing to present specific bargaining proposals at the briefing, and the Respondent cites no authority indicating that the Union's initiative is nonnegotiable because the Union did not discuss procedures and appropriate arrangements at the briefing. Moreover, the Union representatives did, in the text of the initiative itself and during the briefing, explain in general terms the sort of procedures and arrangements they wanted to negotiate: the June 3 letter explained that the Union wanted to develop procedures that would address emergencies across the IRS in a uniform manner and arrangements for bargaining unit employees affected by emergencies. Jt. Ex. 2 at 2. Rukstele and Gettmann explained that in prior disasters and other emergencies where IRS offices had been closed, the Agency had not handled them consistently, and that no procedures existed to guide employees or managers as to how to handle issues such as where to report, where to obtain information, when a building was safe to resume working, how an emergency affected contractual benefits such as flexiplace and administrative leave, or how it might affect employees with children in daycare. Tr. 37-38, 62, 74-77, 83, 90.

The Respondent acknowledges the Union's claim that it sought to bargain procedures within the meaning of § 7106(b)(2) of the Statute. R. Br. at 22. Yet the Respondent does not explain why the Union's initiative does not entail such procedures, even though the Agency has the burden of raising and supporting such claims. 5 C.F.R. § 2423.32; *see PBGC*, 59 FLRA at 50; *cf. Soc. Sec. Admin., Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 603 (2014) (denying agency's management rights

[14] As I noted earlier, and at note 3, Article 47, Section 2.C.4. of the CBA requires proposals to be submitted within fifteen days of the briefing, which was the day that the Agency sent its letter refusing to bargain. The Agency clearly made its decision not to bargain without waiting for any proposals from the Union.

exception to arbitration award where agency failed to allege that disputed contract provisions were not 7106(b)(2) procedures). Accordingly, the Respondent has failed to show that the Union's initiative does not involve procedures within the meaning of § 7106(b)(2) of the Statute. Furthermore, it is evident that, by asking to negotiate a "process . . . under which the IRS addresses emergencies . . . in a uniform manner[,]" (Jt. Ex. 2 at 2), and by offering the illustrations described above, the Union was proposing precisely the type of procedures encompassed by § 7106(b)(2).

The Respondent further argues that the Union's initiative would "excessively interfere" with management's right to take necessary action in emergencies. R. Br. at 21. A determination as to whether a matter excessively interferes with a management right is reached by weighing the benefit to employees against the burden on the exercise of the management rights involved. *Am. Fed. of Gov't Employees, Council of Prison Locals 33, Local 506*, 66 FLRA 929, 932 (2012) (*Prisons Locals*); *Nat'l Assoc. of Gov't Employees, Local R14-87*, 21 FLRA 24 (1986). The Agency asserts that the initiative "takes it upon itself to define what constitutes an emergency," (R. Br. at 22), but in fact the initiative makes it clear (with the abbreviations "e.g." and "etc.") that floods, fires, hurricanes, and tornadoes are only examples of what might be considered emergencies (Jt. Ex. 2). The initiative does not expressly bar the Respondent from independently assessing whether an emergency exists, and it does not prevent the Respondent from taking action during an emergency. While the Agency asserts that the wording of the initiative "by definition" would "hinder" management's exercise of its § 7106(a)(2)(D) rights (R. Br. at 21), it does not explain how this is so, the extent to which the initiative would burden the Agency, or whether that burden would be outweighed by the initiative's benefits to employees. *Prison Locals*, 66 FLRA at 932.

Ballance's testimony illustrates how superficial the Agency's management-rights claims are. In this regard, Ballance said nothing to counter the Union's claim that it sought to bargain procedures within the meaning of § 7106(b)(2), and she said hardly anything to counter the Union's claim that it was attempting to bargain appropriate arrangements within the meaning of § 7106(b)(3) of the Statute. Even assuming that Ballance was correct in asserting that the Union's initiative affected management's rights to recall employees and to when to keep a building open or to close it, Ballance did not describe, much less explain, how the burden of the Union's initiative would outweigh the benefits to employees. Tr. 205-07. In this regard, the Union witnesses emphasized an interest in establishing some consistency in the manner in which the Agency handles emergencies. Tr. 16, 37-38, 76. By requesting to negotiate some general, consistent protocols under which the Agency made its decisions, the Union was not (at least at this early stage of the Article 47 bargaining process) limiting the Agency's 7106(a)(2)(D) authority; rather, it was simply asking that some sort of procedure be developed. Similarly, with respect to the Union's request that air quality in a building be tested after a disaster before employees are required to return to work, Ballance asserted that "whether a building's open or not is a management decision to make." Tr. 83, 206-07. But the Union's interest in air quality testing does not prevent or excessively interfere with the Agency's right to open or close buildings, and the Agency's brief does not illustrate further or quantify the degree to which the Union's initiative allegedly interferes with management's rights.

Further, the cases the Respondent relies on are easily distinguishable. In *Local 2059*, the disputed provision actually defined an emergency as a "situation which imposes sudden, immediate requirements for the Employer as a result of natural phenomena or other circumstances beyond the Employer's reasonable control or ability to anticipate." 22 FLRA at 137. The Authority held that by limiting the exercise of management's rights to those situations falling within the definition of "emergency," the proposal would have precluded the agency from independently assessing whether an emergency exists; for that reason, the proposal was nonnegotiable. In doing so, the Authority did not consider whether the proposal was negotiable under § 7106(b)(2) or (b)(3) of the Statute. *Id.* at 140-41. The Union's initiative here is different. While it describes the general nature of what it sought to negotiate, "*e.g.*, floods, fires, hurricanes, tornados, *etc.*," it does not use those examples to limit what an emergency is. Jt. Ex. 2 at 1 (emphasis added). Indeed, the Union's reference to "Agency-declared emergencies" indicates that the Union presumed that the Respondent is responsible for defining emergencies. *Id.* at 2. For these reasons, the Union's initiative does not impose the severe burdens that the provision in *Local 2059* imposed. Moreover, because *Local 2059* does not discuss procedures or appropriate arrangements, it does not speak to whether the Union's initiative is negotiable under § 7106(b)(2) or (3) of the Statute. 22 FLRA at 140-41. Accordingly, the Respondent's reliance on *Local 2059* is misplaced.

In addition, the Agency cites *LIUNA* for the proposition that proposals that "interfere with or prevent agency action in an emergency" are contrary to § 7106(a)(2)(D) of the Statute. R. Br. at 21. In *LIUNA*, the Union submitted a proposal that required the agency to give employees three days' notice of reassignment in emergencies. 14 FLRA at 689. The Authority found that the proposal imposed a condition on the agency's ability to respond to emergencies and, thus, violated § 7106(a)(2)(D) of the Statute. *Id.* In so finding, the Authority did not consider whether the proposal was negotiable under § 7106(b)(2) or (b)(3) of the Statute. *Id.* Here, the Union's initiative does not impose a condition that must be satisfied before the Agency can respond to an emergency. And like *Local 2059*, *LIUNA* says nothing about whether the Union's initiative is negotiable under § 7106(b)(2) or (b)(3) of the Statute. Thus, *LIUNA* does not support the Respondent's case.

Based on the foregoing, the Respondent has failed to rebut the evidence that the Union's initiative entails procedures within the meaning of § 7106(b)(2) of the Statute and appropriate arrangements within the meaning of § 7106(b)(3) of the Statute. As such, the Respondent has failed to demonstrate that the Union's initiative is nonnegotiable under § 7106 of the Statute.

2. The Respondent has failed to demonstrate that all aspects of the Union's initiative are covered by the CBA

The "covered by" doctrine excuses parties from bargaining when they have already bargained and reached agreement concerning the matter at issue. *IRS*, 63 FLRA at 617. To assess whether a particular matter is covered by a collective bargaining agreement, we apply a two-pronged test. *Nat'l Air Traffic Controllers Assoc'n*, 66 FLRA 213, 216 (2011).

Under the first prong, we examine whether the subject matter is expressly contained in the agreement. An exact congruence of language is not required; instead, the matter is "covered" if a reasonable reader would conclude that the contract provision settles the matter in dispute. *Id.* The Authority has found the subject matter of proposals not to be contained in a contractual provision when the proposals did not modify or conflict with the express terms of the provision, even when the proposal concerned the same general range of matters addressed in the contractual provision. *See Nat'l Air Traffic Controllers Ass'n*, 61 FLRA 437, 441-42 (2006), and cases cited therein.

If the agreement does not expressly contain the matter, then, under the second prong of the doctrine we consider whether the subject is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement. *Nat'l Treasury Employees Union, Chapter 160*, 67 FLRA 482, 485 (2014). In doing so, we consider the parties' intent and bargaining history. *Nat'l Fed'n of Fed. Employees, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 126 (2011) (*NFFE*). A matter must be more than tangentially related to a contract provision to be covered by the agreement. *Id.* Rather, the party asserting the "covered by" argument must demonstrate that the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the collective bargaining agreement that the negotiations that resulted in that provision of the agreement are presumed to have foreclosed further bargaining over the matter. *Id.* One of the factors to consider is whether the contract provision "comprehensively addressed" the subject at issue. *U.S. Dep't of the Treasury, IRS, Nat'l Distrib. Ctr., Bloomington, Ill.*, 64 FLRA 586, 592-93 (2010) (*National Distribution Center*); *Am. Fed. of Gov't Employees, Nat'l Border Patrol Council*, 54 FLRA 905, 910-11 (1998). For example, in *USDA, Forest Serv., Pacific Nw. Region, Portland, Or.*, 48 FLRA 857 (1993) (*Forest Service*), the Authority found a union's proposals regarding the involuntary detailing of employees were "inseparably bound up with" (and thus covered by) the CBA article on details, where the agreement defined when details could be implemented, when an employee could be excused from a detail, what effect a detail would have on an employee's salary, and how a detailed employee's performance would be evaluated. *Id.* at 860.

3. The Respondent has effectively conceded that some of the matters contained in the Union's initiative are not covered by the CBA

In its July 21, 2011, letter declining to bargain, the Respondent only claimed that some of the matters raised in the Union's initiative were covered by the CBA. Jt. Ex. 5 at 1. At the hearing, Ballance confirmed that many matters raised in the Union's initiative are not covered by the CBA. When asked whether there was a CBA provision relating to daycare, Ballance stated, "No not – no, I don't believe so." Tr. 208. When asked whether there was a provision that addresses building access in the case of an emergency, Ballance stated, "Not that I'm aware of." Tr. 196. She indicated that her objections to bargaining over daycare, lack of water pressure, and mileage reimbursement were not based on "covered by" claims. Tr. 197. In its post-hearing brief, the Respondent does not allege that there is an article in the CBA that deals with how the Agency addresses emergencies generally, and it does not claim that the subjects of access to buildings, availability of daycare for employees' children, lack of water pressure in facilities, and entitlement to mileage reimbursement are covered by the

CBA. Because the Respondent has not raised a "covered by" defense with respect to these aspects of the Union's initiative, and because the Respondent has failed to show that any aspect of the Union's initiative is nonnegotiable under §7106 of the Statute, the Respondent was obligated to bargain over at least some parts of the Union's initiative. By refusing to do so, the Respondent violated §7116(a)(1) and (5) of the Statute. *Customs*, 65 FLRA at 874; *DOD*, 61 FLRA at 694; *Interior*, 56 FLRA at 54.

The two primary areas of the initiative that the Agency did assert to be covered by the CBA were flexiplace and administrative leave. I now consider whether either or both of these subjects are outside the duty to bargain on that basis.

4. The Respondent has not demonstrated that flexiplace, as referred to in the Union's initiative, is covered by Article 50, Section 6.E. of the CBA

The Respondent asserts that "Flexiplace in the context of emergencies is covered by" Article 50, Section 6.E. R. Br. at 23. That provision states:

> When an emergency condition forces the closure of an IRS facility and employees thereof are granted administrative leave as a result, an employee of that same facility (a) who is working at home on an approved Flexiplace Program and (b) who is prevented from accomplishing work because of that same emergency condition (for example, where a power outage forces the closure of an office, and that same power outage prevents a Flexiplace employee from completing his or her work assignments at home), that Flexiplace employee will be provided the same amount of administrative leave granted employees who were working in the closed facility. A Flexiplace employee claiming administrative leave under this provision may be responsible for providing appropriate documentation in support of that claim.

Jt. Ex. 1 at 137.

In evaluating whether flexiplace, as referenced in the Union's initiative, is expressly contained in Article 50, Section 6.E., we consider whether that provision settles the matter in dispute. In seeking to negotiate "protocols that will govern the manner in which the agency addresses emergencies that affect bargaining unit employees" in a uniform manner (Jt. Ex. 2 at 1), and in seeking to discuss flexiplace in connection with such protocols, Rukstele testified that the Union hopes to establish broadly applicable guidelines that would go beyond the narrow boundaries of Article 50, Section 6.E. Tr. 18. While that provision covers employees currently on flexiplace, the Union wanted to address the possibility of other employees working flexiplace during the period their offices are closed in an emergency. *Id.*

Nothing in Article 50, Section 6.E. expressly contains wording about such protocols. Moreover, it is hard to see how this narrow, technical provision – which, to paraphrase, entitles employees working flexiplace during an emergency to the same amount of administrative leave as other employees, under certain circumstances – would address the

Union's broader concerns, such as how employees would conduct their flexiplace work if their offices are closed, how they might gain access to their files and computers, etc. Further, nothing in the Union's initiative pertaining to flexiplace modifies or conflicts with the express terms of Article 50, Section 6.E. For example, nothing in the Union's initiative suggests that employees on flexiplace during an emergency would no longer be entitled to the same amount of administrative leave as employees based at the same facility. Accordingly, the Agency has failed to demonstrate that the Union's initiative as it pertains to flexiplace is expressly contained in Article 50, Section 6.E.

Moving to the second prong of the doctrine, no evidence was offered regarding the parties' bargaining history or the parties' intent in drafting Article 50, Section 6.E. Tr. 194. Further, based on the wording of the provision, Ballance tacitly acknowledged the obvious – that a narrow provision like Article 50, Section 6.E. could not have been intended to apply to the broad range of emergencies and employees contemplated in the Union's initiative. In this regard, when Ballance was asked whether Article 50, Section 6.E. would guide the Agency's actions in an event like the September 11th terrorist attacks, Ballance admitted, "I do not think Section 6E speaks to that specific issue." Tr. 196. That Article 50, Section 6.E. does not "speak" to such an obvious example of an emergency that would likely involve flexiplace suggests that the parties did not contemplate that Article 50, Section 6.E. as foreclosing further bargaining on that matter.

Finally, while the Respondent did not specifically raise this argument, I find it notable that Ballance struggled to support her claim that Article 50 as a whole covers the flexiplace aspects of the Union's initiative. Tr. 192-96. Specifically, when Ballance was asked how the CBA might apply to flexiplace in an emergency such as the September 11 terrorist attacks, she replied:

> I do not think Section 6E speaks to that specific issue. However, I think practically Article 50 speaks to it. One of the issues constantly discussed is, you know, if the employee doesn't – has the equipment as part of their jobs to be able to work flexiplace. You know, there's some practicalities with regard to it if you're – aren't already on flexiplace getting what you need to work flexiplace once an emergency has already occurred. I think there's some problems – there might be some problems with regard to that. But I think Article 50 covers the issue.

Tr. 196. While it is true that the other sections of Article 50 address in some detail the eligibility criteria and procedures for employees to engage in flexiplace work, the applicability of flexiplace during emergencies is only addressed in Section 6.E., and as noted, that provision only addresses the question of administrative leave for such employees. This leaves a large gap in coverage with regard to the many other ways that an emergency can adversely affect employees – both those working in flexiplace arrangements and those who might need to do so for the duration of an emergency. In this respect, Article 50 is not "comprehensive" in the way that the article on details was in the *Forest Service* case,

48 FLRA at 860; rather, it is more comparable to the "recall and release" article of the IRS-NTEU contract in *National Distribution Center*, 64 FLRA at 592-93. That is, while Article 50 deals with a wide range of flexiplace issues, its silence on how employees might work on flexiplace during an emergency suggests that it was not meant to foreclose further bargaining on the matter.

Based on the foregoing, I find that flexiplace as referenced in the Union's initiative is not inseparably bound up with a subject expressly covered by Article 50, Section 6.E. or by the entirety of Article 50 under the second prong of the test. Accordingly, I find that the Union's initiative is not covered by Article 50 of the CBA.

5. Administrative leave as referenced to in the Union's initiative is covered by Article 36, Section 3 of the CBA

The Union's initiative requests to "negotiate a process and various arrangements under which the IRS addresses emergencies . . . [on] such subjects as . . . administrative leave . . . ." Jt. Ex. 2 at 2. In the Respondent's July 21, 2011, letter refusing to bargain, the Respondent asserted that "the issue of Administrative Leave granted during an emergency is covered by Article 36, Subsection 3E" of the CBA. Jt. Ex. 5 at 1. However, in its motion for summary judgment, the Respondent argued more broadly that "[t]he issue of Administrative Leave during an emergency" is covered by *all* provisions within Section 3 of Article 36 of the CBA. GC Ex. 1(g), R. MSJ at 10 n.4. The Respondent reiterates this broader argument in its post-hearing brief. R. Br. at 23.

Article 36 of the CBA, entitled "Administrative Leave," consists of thirteen sections; Section 3 itself consists of five subsections, each of which address different aspects of employees' entitlement to administrative leave during emergencies. Jt. Ex. 1 at 101-03. Article 36, Section 3 expressly refers to emergencies and administrative leave. Specifically, Section 3: (1) requires the Agency to make reasonable efforts to notify employees when it closes an office for an emergency and grants administrative leave; (2) requires the Agency to grant administrative leave during an emergency that prevents an employee from arriving at the office, even if the office is not closed, when certain conditions are met; (3) requires employees (who may be eligible for emergency-based administrative leave) to contact their supervisors to explain the circumstances and give an estimated time of arrival as early as practicable; (4) entitles employees on flexiplace to as much administrative leave as employees based at the same office, under certain circumstances (mirroring the language of Article 50, Section 6.E. discussed earlier); and (5) provides that, when a natural disaster area is declared, employees faced with a personal emergency caused by that disaster are eligible for a reasonable amount of administrative leave, under certain circumstances. Jt. Ex. 1 at 101.

Based on Article 36's extensive provisions relating to administrative leave in general, and on Section 3's specific and lengthy treatment of administrative leave during emergencies, a reasonable reader would conclude that Article 36, Section 3 settles those aspects of the Union's initiative relating to administrative leave during emergencies, under the first prong of the "covered by" test. While the language of the Union's initiative is too broad to determine

whether it would conflict with Article 36, the comprehensive scope of Section 3 and the detailed manner in which it treats administrative leave in emergencies, would lead an objective reader to conclude that the parties intended to foreclose further bargaining on the matter. *Forest Service*, 48 FLRA at 860. While Rukstele asserted at the hearing that Article 36, Section 3.E. "only addresses natural disasters," that claim ignores other provisions of Section 3, which apply to other types of emergencies, such as transit strikes and mass demonstrations. Tr. 18; Jt. Ex. 1 at 101. Thus, even if the first prong of the test is not met, the second prong certainly is. Accordingly, I find that those aspects of the Union's initiative relating to administrative leave during emergencies are covered by Article 36, Section 3 of the CBA.

6. The Respondent's remaining "covered by" claims are without merit

The Respondent asserts that Article 27, Section 1.E. "covers notifying the Union regarding evacuation due to bomb threats[,]" and that Article 27, Section 4.D.4. "covers the 'means for advising employees of emergency evacuation procedures.'" R. Br. at 23. Article 27, Section 1.E. states, in pertinent part: "After notifying appropriate authorities, the Employer will notify the Union of a bomb threat. Such notice will include an explanation for evacuating or not evacuating the building." Jt. Ex. 1 at 82. Section 4.D.4. of the same article assigns the Safety Advisory Committee with responsibility for "recommending the means for advising employees of emergency evacuation procedures[.]" *Id.* at 83.

While the Union's initiative is exceedingly broad, seeking to establish protocols for all types of emergencies, Article 27, Section 1.E. is narrow and does not expressly contain anything concerning the manner in which the Agency addresses emergencies. It pertains only to bomb threats and requires only limited action on the Respondent's part. Given these facts, a reasonable reader would not think that Article 27, Section 1.E. settles the matters raised by the Union's initiative. Section 4.D.4. is slightly wider in scope than Section 1.E., in that it applies to all emergencies, but again it only addresses how employees will be notified of evacuation procedures and does not attempt to address the evacuation procedures themselves or the many issues that may arise before, during, or after evacuation. There is no indication in the record that the Union's initiative would modify or conflict with either of these provisions. For these reasons, I find that the Union's initiative is not covered by either Section 1.E. or Section 4.D.4. of Article 27 under the first prong of the test.

With regard to the second prong of the "covered by" test, the Respondent cites no bargaining history or other evidence to suggest that these two narrow provisions are inseparably bound up with the broad-based emergency protocols raised in the Union's initiative. R. Br. at 23; Jt. Ex. 1 at 82. They could not have been intended to foreclose further bargaining on the much more broadly-based protocols sought in the Union's initiative. The fact that Article 27, Sections 1.E. and 4.D.4. are in some way related to security or evacuations shows only that they are, at most, tangentially related to the Union's initiative. *NFFE*, 66 FLRA at 126. For these reasons, I find that the Union's initiative is not covered by Article 27, Sections 1.E. and 4.D.4. under either prong of the "covered by" test.

7. The Respondent's efforts to impeach the credibility of the GC's witnesses are misdirected

In its brief, the Respondent attacks the credibility of Rukstele's and Gettmann's testimony. R. Br. at 24-27. After these witnesses conceded that the Union had submitted an information request to the Agency in 2010 that was mostly identical to the 2011 information request, they both denied any direct involvement in the drafting of the 2010 request. Tr. 21, 42-43, 87. The Respondent argues that their denials are implausible, due to the similarity of the two information requests and due to the active role that both witnesses took in Union matters. R. Br. at 25-26. Additionally, both Rukstele and Gettmann testified that, after the July 6, 2011 briefing, they had no indication that the Agency would deny their information request. Tr. 38-39, 83-84. Again, the Respondent argues that their testimony was incredible, since the Agency had denied a similar request the prior year. R. Br. at 25, 27.

The Respondent correctly states that "the briefing played a large part in the Agency's conclusion that they had no Statutory obligation to bargain[.]" R. Br. at 24. But it is incorrect in arguing that the alleged inaccuracies in Rukstele's and Gettmann's testimony are "extremely significant[ ]" in undermining their credibility or in demonstrating the nonnegotiability of the Union's initiative. *Id.*

First, I reject the impeachment arguments themselves. Rukstele said she knew the Agency had denied an earlier information request, and there was no reason (or anything to gain) for her to falsely deny having used the earlier document in drafting the new one. Gettmann is the president of a local union in San Diego, and his lack of familiarity with the details of the 2010 request is perfectly credible. Moreover, their testimony that they had no reason to expect the Agency to deny the 2011 information request was totally innocuous, and it was reasonable based on Ballance's own testimony about the briefing. All of the witnesses who participated in the briefing stated that there was very little discussion of the Union's information request, and that the Agency representatives primarily listened to the Union and didn't argue with the Union's explanations. Thus, while the Respondent now seeks to impeach the Union officials by means of argument, it failed to offer testimony from its own witnesses that differs from Rukstele's and Gettmann's descriptions of what was discussed at the briefing.

More fundamentally, however, the attacks on Rukstele and Gettman are pointless. Even if they knew more about the 2010 information request than they admitted, and even if they suspected all along that the Agency would deny the 2011 information request, the Agency's case would not be bolstered. The Respondent's argument is that the testimony of the GC witnesses regarding their involvement in the 2010 information request and their expectation of whether the Agency would deny the 2011 information request is crucial "in the Agency's conclusion that they had no Statutory obligation to bargain[.]" R. Br. at 24. I reject any logical connection between these issues. If the Union representatives had lied at the hearing regarding the substance or details of the Union's bargaining initiative, or if they had misrepresented to the Agency representatives in the briefing about what the Union sought to

negotiate, I might be inclined to accept the Respondent's argument. But Ballance did not dispute the overall testimony of Rukstele and Gettmann as to how the Union explained its bargaining initiative at the briefing. The question of whether the Union's initiative was negotiable does not turn on the credibility of any of the witnesses, and I have already explained why the Respondent failed to rebut the GC's assertion that the initiative was (in most respects at least) negotiable.

The Respondent violated § 7116(a)(1) and (5) of the Statute

The Respondent has failed to show that any aspect of the Union's initiative is nonnegotiable under § 7106 of the Statute. Further, the Respondent has failed to show that aspects of the Union's initiative other than administrative leave are covered by the CBA. Because the Respondent refused to bargain over aspects of the Union's initiative that are negotiable under § 7106 of the Statute and are not covered by the CBA, the Respondent violated § 7116(a)(1) and (5) of the Statute. For this violation in Case No. WA-CA-11-0515, I recommend that the Authority adopt the remedial Order at the end of this decision.

B. Case No. WA-CA-11-0516

Section 7114(b)(4) of the Statute requires an agency, upon request and "to the extent not prohibited by law," to provide a union with data that is: (1) normally maintained by the agency; (2) reasonably available; (3) necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (4) not guidance, advice, counsel, or training to management. 5 U.S.C. § 7114(b)(4); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Fort Dix, N.J.*, 64 FLRA 106, 108 (2009). The Respondent argues that the Union failed to establish a particularized need for the information, and that the information was not reasonably available. I consider these arguments in turn.

1. The Union failed to meet its burden of establishing that the requested information was "necessary" under § 7114(b)(4) of the Statute

To establish that requested information is "necessary" under § 7114(b)(4) of the Statute, a union must establish a "particularized need" for information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information and the connection between those uses and the union's representational responsibilities under the Statute. *Treasury*, 64 FLRA at 978. The requirement that a union establish particularized need will not be satisfied merely by showing that requested information is relevant or useful to a union. Instead, a union must establish that the requested information is required in order for the union to adequately represent its members. The Union is responsible for articulating and explaining its interests in disclosure of the information. *Id.* The requirement that a union articulate its need "gives content to the 'particularized' part of the test by requiring not just that there be a need – a standard that

unions probably could meet whenever seeking information in connection with a grievance – but also that unions explain with some specificity why they need the information." *Am. Fed. of Gov't Employees, Local 2343 v. FLRA*, 144 F.3d 85, 89 (D.C. Cir. 1998). Satisfying this burden requires more than a conclusory or bare assertion. Among other things, a request for information must be sufficient to permit an agency to make a reasoned judgment as to whether information must be disclosed under the Statute. *Treasury*, 64 FLRA at 978.

A union's burden of establishing particularized need also includes the burden of establishing the necessity of "the scope of the request." *Soc. Sec. Admin.*, 67 FLRA 534, 538 (2014). The scope of a request encompasses the type of information requested as well as the temporal and geographic scope of the request. *SSA 1*, 64 FLRA at 295. Where the information sought is broader than the circumstances covered by the request, and the union has not been able to establish a connection between the broader scope of the information requested and the particular matter referenced in the request, the Authority has found that the union has not established a particularized need for the information. *U.S. Dep't of the Air Force, Randolph AFB, San Antonio, Tex.*, 60 FLRA 261, 264 (2004) (*Randolph AFB*).

A union must articulate its interests in disclosure of the information at or near the time of the request, not for the first time at an unfair labor practice hearing.. *Id.* at 263. In this connection, the Authority has emphasized that, to the extent reasons offered in a union's hearing testimony were not previously articulated, they "generally" may not be relied on to establish particularized need. *Treasury*, 64 FLRA at 980. Where a party has failed to assert that the hearing testimony on which it relied was previously articulated, and where it has not provided any other basis for concluding that the "general" rule does not apply, the Authority has refused to consider hearing testimony in assessing whether the union established particularized need. *Id.*

The agency is responsible for establishing any countervailing anti-disclosure interests and must do so in a non-conclusory way at or near the time of the union's request. *SSA 1*, 64 FLRA at 295-96. However, a union must establish a particularized need for requested information *before* an agency is required to come forward with countervailing interests. *Nat'l Labor Relations Board*, 60 FLRA 576, 581 (2005). The showing of particularized need is not contingent on the presence or absence of countervailing anti-disclosure interests. *Id.* Thus, while there is no dispute that the Respondent failed to raise anti-disclosure concerns in a timely manner, this failure comes into play only if the Union has established particularized need. R. Br. at 11; Tr. 38; 39, 64-65.

With these general principles in mind, I focus on the *Treasury* decision, which involved a similar information request. The Authority has recognized that preparing proposals for collective bargaining is a central union representational responsibility under the Statute. 64 FLRA at 979. However, the Authority has held that an assertion that requested information is necessary to "assist in developing proposals for . . . negotiations" is a

"conclusory or bare assertion that is insufficient to establish particularized need." *Id.*, quoting *Dep't of the Air Force, Wash., D.C.*, 52 FLRA 1000, 1009 (1997) (*Air Force*) (internal quotation marks omitted). In *Treasury*, the union sought information "to help us prepare for these negotiations" over employee engagement surveys similar to surveys the parties had previously negotiated. 64 FLRA at 973. The dispute went to arbitration, and the arbitrator found that the agency "knew very well what the Union's 'particularized need' was," and that the union did not need to meet the requirements of the "hyper-technical" particularized need test. *Id.* at 975. In spite of these findings, the Authority determined that the union had not explained why it needed the particular information that it requested and the uses to which it would have put that information with respect to preparing for negotiations. *Id.* at 979. As such, and as the union was not entitled to bargain over the survey, the Authority found that the union failed to establish a particularized need for the requested data. *Id.*

Here, the Union stated that it sought the information "in order to prepare for negotiations" and needed the information to "properly prepare for negotiations with respect to the . . . initiative." Jt. Ex. 3. This short, unspecific, and conclusory explanation is virtually identical to the explanation found deficient in *Treasury*, 64 FLRA at 979; *Air Force*, 52 FLRA at 1009.

Further, as Ballance's testimony illustrates, the Union did not explain why it needed: all the requested documents from all of the locations where the documents are stored; the documents' effective dates; the dates of, and locations where, any of the requested plans were implemented; and the underlying authority for the creation of the requested documents. Tr. 186. True, the Respondent overreaches in some of its arguments. A reasonable reader would not interpret the Union's request as asking for archived plans, even though the Union asked for "all" business continuity plans. Jt. Ex. 3; *see Dep't of the Air Force, Scott AFB, Ill.*, 38 FLRA 410, 412, 416 (1990) (upholding judge's interpretation of the information request). Moreover, the geographic scope of the information request is consistent with the Union's request for nationwide bargaining. *See SSA 1*, 64 FLRA at 296; *Randolph AFB*, 60 FLRA at 264. But the Respondent is correct to highlight the Union's failure to explain or justify other aspects of the scope of its request, as the Union did not explain why it needed each of the many types of plans that it requested. Jt. Ex. 3. It is not self-evident, even to an IRS official familiar with these types of documents, why each of the several types of documents is necessary for bargaining, especially when the bargaining had been initiated by the Union and had only been explained in general terms to the Agency. Despite the lack of such explanation in the information request, the Union could have offered a more detailed explanation to management at the July 6 briefing, but both Union and management participants in the briefing agreed that very little was said there about the information request. Tr. 38, 64-65, 185-86, 189-90. The Agency's letter denying the information request explained the purpose and contents of its business continuity plans (as well as the other requested plans) and asserted that those plans were "not germane" to the negotiations proposed by the Union. Jt. Ex. 4 at 2. This left the door open for the Union to offer additional justification, but it failed to do so. *See Air Force*, 52 FLRA at 1007.

Realizing perhaps that Rukstele did not explain much in her request, the GC asks me to focus on what Rukstele said at the hearing – specifically, her claim that the Union needed the requested information "to intelligently negotiate processes, procedures, and appropriate arrangements stemming from what the Agency was planning to do – what the established plans were." GC Br. at 16 (quoting Tr. 21). But the Authority generally does not rely on explanations raised for the first time at an unfair labor practice hearing, and the GC cites no reason for departing from that rule here. *Treasury*, 64 FLRA at 980. Accordingly, I do not consider the post-hoc explanations provided by Rukstele, or for that matter, Gettmann.[15]

Because the Union's information request contained only a short, unspecific, and conclusory explanation of need, the Union failed to establish that the requested information was necessary within the meaning of § 7114(b)(4) of the Statute.

2. The requested information was not reasonably available within the meaning of § 7114(b)(4) of the Statute

The Statute requires an agency to provide data that is reasonably available. *U.S. Dep't of the Air Force, Randolph AFB, San Antonio, Tex.*, 60 FLRA 268, 272 (2004). Consistent with this requirement, an agency is not required to provide data that is available only through "extreme" or "excessive" means. *Id.* Determining whether extreme or excessive means are required to retrieve available data requires case-by-case analysis of relevant facts and circumstances. *Id.* Such facts and circumstances include the efforts required the make the documents available, including costs and displacement of the agency's workforce. *See BOP*, 55 FLRA at 1255 n.9 (citing *DOJ v. FLRA*, 991 F.2d at 292).

The Authority has found information to be reasonably available when, for example, retrieval would have taken 350 hours and involved approximately 10,000 documents, *Border Patrol*, 40 FLRA at 804-05; taken 150 hours and cost $1,500, *McClellan AFB*, 37 FLRA at 993-94; or taken three weeks, *HHS*, 36 FLRA at 950-51. In addition, the Authority has found information to be reasonably available when retrieving it would have required writing a computer program; *New London*, 27 FLRA at 796-97 (though in that case, the respondent provided no evidence that doing so would be unnecessarily costly, time consuming, or difficult). On the flip side, information was found not to be reasonably available where, for example, it would have taken "several employees . . . several weeks" to produce the data, *DOJ v. FLRA*, 991 F.2d at 291, and when it involved personnel files maintained by over 6,000 supervisors, *Dep't of the Air Force, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 21 FLRA 529, 531-32 (1986).

Here, the Agency presented substantial and credible evidence showing that producing the requested information would strain the Respondent's resources. As the GC acknowledges, the Union's information request encompassed approximately 649 occupant emergency plans, 23 incident management plans, 3324 business continuity plans, and

[15] In any case, the Union's explanation at the hearing of its need for these documents was only slightly more helpful than its original request, but still insufficient to satisfy the legal standard.

750 disaster recovery plans. Tr. 99, 106, 122, 154-55; *see* GC Br. at 18 n.27. The Union's information request presumed that documents would be "redacted, as needed," (Jt. Ex. 3) and the Respondent's witnesses testified credibly that redacting the documents (really, reviewing the documents for redaction) would take a significant amount of time. Specifically, the witnesses stated that it would take: two hours to redact a single occupant emergency plan (Tr. 104-05); four hours to redact a single continuity plan (Tr. 130); and six and a half hours to redact a single disaster recovery plan (Tr. 158). Based on the estimate of the Agency's witness that it would take about a year and a half to redact all disaster recovery plans between 2007 and 2011, this would mean that it would take a Grade 15 employee more than three and a half months to redact the plans for 2011, at a cost of about $60,000 in employee pay. Tr. 160. (See my comments in note 7, above.) Multiplying the number of documents with the amount of time it takes to redact a document, the Respondent concludes, and the GC does not specifically dispute, that it would take 1298 hours to produce all current occupant emergency plans, 13,296 hours to produce all current continuity plans for one year, 23 hours to produce all current incident management plans, and about 624 hours to produce all disaster recovery plans for one year. R. Br. at 17-19; GC Br. at 18-19 & n.27. Based on the Respondent's reasonable calculations, it would take approximately 15,241 hours to produce the requested information. This far exceeds any of the examples of reasonably available information cited by the GC. *McClellan AFB*, 37 FLRA at 993-94; *HHS*, 36 FLRA at 952, 960. And while the GC argues that the Authority found information contained in approximately 10,000 documents to be reasonably available, producing those documents would have taken only 350 hours, far less time than required here. *Border Patrol 1*, 40 FLRA at 804-05.[16]

The GC notes that the witnesses who testified about the burden of complying with the information request[17] were not consulted until after the Respondent had denied the Union's information request. GC Br. at 18. If the GC is arguing that Wolters and Finstad are biased because they are akin to paid experts, I find that claim unpersuasive. Such experts, are a normal part of litigation. If the GC is arguing that the Agency could not offer their testimony about those costs, since those details were not provided to the Union in the denial letter, I disagree. The Agency did tell the Union in its denial letter that "the cost associated with obtaining the information would be prohibitively excessive" and that "the displacement of the IRS's workforce would be overly burdensome[,]" among other reasons. Jt. Ex. 4 at 2. This explanation was sufficiently detailed to put the Union on notice of the reasons for the denial,

---

[16] The continued precedential value of the *Border Patrol 1* decision's analysis of what is "reasonably available" is subject to serious doubt. While the Authority's decision in that case was not appealed, a subsequent, similar information request involving the same parties was the basis for the Fifth Circuit's decision reversing the Authority in *DOJ v. FLRA*; *see* 991 F.2d at 287 n.1, reversing *Border Patrol 2*. The court found that the information (consisting of between 5000 and 6000 documents) was not reasonably available and criticized the Authority's standards on this issue. 991 F.2d at 288, 291-92. Thus, even if I were an advocate rather than a judge, I would be hesitant to argue that it is reasonable to require an agency to furnish 10,000 documents.

[17] The GC challenged the testimony of Wolters, Finstad, and Rodriguez, but for the reasons stated at note 8, I have not relied on the testimony of Rodriguez.

and it opened the door for the Union to discuss the details of the Agency's position further with Agency officials or to explore possibilities for agreeing on a less burdensome range of documents. Having made it clear to the Union in July 2011 that it felt it would be too expensive and time-consuming to obtain the information, the Respondent was free to provide more precise calculations at the hearing. In any event, I find the testimony of both Wolters and Finstad to be credible, based in large part on their ability to describe in detail the reasonable methods they used to redact the documents.

Finally, the GC contends that the Respondent "did not ask the Union to clarify its request[.]" GC Br. at 19. I have already indicated, however, that the Agency's explanation that the business continuity and other plans were "not germane" to the Union's stated purpose, and the Agency's claim that the cost and time needed to obtain the requested information was unreasonable, implicitly invited the Union to clarify or modify its request. More importantly, however, a request for clarification is not necessary, or even relevant, to determining whether it would take extreme or excessive means to produce the requested information. *See BOP*, 55 FLRA at 1255 n.9.

Based on the foregoing, I find that producing the requested information would have required extreme or excessive means. Accordingly, the requested information was not "reasonably available" within the meaning of § 7114(b)(4) of the Statute.

In summary, because the Union did not establish a particularized need for the requested information, and because the requested information was not reasonably available, the Respondent did not violate § 7116(a)(1), (5), and (8) of the Statute when it refused to furnish the information. Accordingly, the Complaint in Case No. WA-CA-11-0516 is dismissed in its entirety.

In light of the Respondent's unfair labor practice in Case No. WA-CA-11-0515, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Rules and Regulations of the Authority and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the Department of the Treasury, Internal Revenue Service (the Respondent), shall:

1. Cease and desist from:

(a) Refusing to bargain with the National Treasury Employees Union (the Union), over the Union's June 3, 2011, initiative to establish protocols governing the manner in which the Respondent addresses emergencies.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of the rights assured them by the Statute.

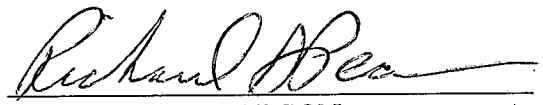
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Upon request, bargain with the Union, to the extent consistent with the Statute, over the Union's June 3, 2011, initiative to establish protocols governing the manner in which the Respondent addresses emergencies.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commissioner of the Internal Revenue Service, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, or other electronic means, if the Respondent customarily communicates with employees by such means.

(c) Pursuant to section 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Washington Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order as to what steps have been taken to comply.

Issued, Washington, D.C., December 12, 2014



RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Treasury, Internal Revenue Service, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain with the National Treasury Employees Union (the Union) regarding the Union's June 3, 2011, initiative to establish protocols governing the manner in which the Respondent addresses emergencies.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of the rights assured them by the Statute.

WE WILL, upon request, bargain with the Union, to the extent consistent with the Statute, over the Union's June 3, 2011, initiative to establish protocols governing the manner in which the Respondent addresses emergencies.

_____

(Agency/Activity)

Date: _____ By: _____

(Commissioner of the Internal Revenue Service)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Washington Region, Federal Labor Relations Authority, whose address is 1400 K Street N.W., 2nd Flr., Washington, D.C. 20424, and whose telephone number is (202) 357-6029.